

February 25, 1994
REPORT TO THE COMMITTEE
ON PUBLIC SERVICES AND SAFETY

DISTRIBUTION OF COMMERCIAL HANDBILLS ON HOTEL AND MOTEL
PROPERTY

At its meeting on January 19, 1994, the Public Services and Safety Committee directed the preparation of an ordinance regulating the distribution of commercial handbills on hotel and motel property. A proposed ordinance is hereby attached.

The Committee also requested information about available remedies against restaurants which prepare food in unsafe and unsanitary conditions. All retail food providers are governed by the California Uniform Retail Food Facilities Law, Health and Safety Code sections 27500 et seq. The County Department of Health Services is the primary enforcement agency. It investigates complaints, and submits appropriate cases to the City Attorney's office for misdemeanor prosecution.

The Ordinance Requires the Name, Address, and Telephone Number of the Distributor on the Handbill

This ordinance requires the distributor to print its name, address and telephone number on the flyer. It further provides the owner of the hotel or motel property can withdraw his consent for distribution of the commercial flyers by writing to the address on the flyer.

A Los Angeles ordinance which required a name and address on every handbill was ruled unconstitutional on its face because of its propensity for chilling free speech. *Talley v. California*, 362 U.S. 60 (1960).

However, this rule has been distinguished when only commercial speech was at issue. *Zanderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); *People v. Anderson*, 235 Cal. App. 3d 586 (1991). The commercial speaker does not have a fundamental right not to divulge accurate information regarding his services. *Id.* In *Anderson*, the court ruled that a law requiring the conspicuous disclosure of the name and address of the manufacturer of any audiotape or videotape offered or possessed for sale did not violate the First Amendment because, unlike the law in *Talley*, this law applied only to

commercial speech, was narrowly drawn to address the problem of false and deceptive commercial practices, and was unlikely to deter political or ideological speech.

Also, courts weigh the purpose and intent of the law against the potential to inhibit speech. *Canon v. Justice Court*, 61 Cal. 2d 446, 451-54 (1964); *People v. Anderson*, *supra*. The proposed ordinance only regulates speech which proposes a commercial transaction. In order to propose a commercial transaction, the distributor must provide identifying information anyway, so that the transaction can be consummated.

The proposed ordinance requires the advertising entity to list its name, address, and telephone number, and specifies that the hotel or motel owner can withdraw consent for the distribution of the material by clearly stating, in writing, that consent is withdrawn.

State Law Prohibits Distribution of Advertising Handbills Without Consent

This then ties into Penal Code section 556.1, which provides:

It is a misdemeanor for any person to place or maintain or cause to be placed or maintained upon any property in which he has no estate or right of possession any sign, picture, transparency, advertisement, or mechanical device which is used for the purpose of advertising, or which advertises or brings to notice any person, article of merchandise, business or profession, or anything that is to be or has been sold, bartered, or given away, without the consent of the owner, lessee, or person in lawful possession of such property before such sign, picture, transparency, advertisement, or mechanical device is placed upon the property.

The City Council could not pass an ordinance similarly prohibiting the placing of advertising material without consent, as such an ordinance duplicates state law, and thus would be preempted by the state law. See *Cohen v. Board of Supervisors*, 40 Cal. 3d 277, 290 (1985); *Batiste v. Superior Court*, 4 Cal. App. 4th 460, 465-66 (1992).

It is reasonable, however, for the City Council to specify

a means by which the property owner can register his lack of consent to the person causing the flyers to be placed on his property. This does not duplicate or contradict state law, but complements it by specifying certain procedures to manifest lack of consent.

The Attorney General has opined that Penal Code section 556, comparable to Penal Code section 556.1 but applicable to public property, could not be applied to campaign signs of candidates for public office, but could constitutionally be applied to commercial advertising.

We do note that under the current case law it appears that the government could constitutionally prohibit all commercial postings on all public property. (See *Metromedia, Inc. v. City of San Diego* (1980) 453 U.S. 490; *City Council of Los Angeles v. Taxpayers for Vincent* (1984) 466 U.S. 789; *Sussli v. City of San Mateo* (1981) 120 Cal. App. 3d 1.)

70 Op. Att'y Gen. 296, 299-300, n3 (1987).

We also have in mind *Planned Parenthood v. Wilson*, 234 Cal. App. 3d 1662 (1991), in which the Fourth District Court of Appeal upheld the right of a privately owned office building to exclude political protesters from its parking lot and premises, because the private property was not the "functional equivalent of the traditional public forum historically provided by town centers, public streets and public sidewalks, as is the case with the major metropolitan retail shopping mall addressed in *Robins v. Pruneyard Shopping Center*, (1979) 23 Cal. 3d 899, 910."

Hotels and motels are open only to paying guests, rather than being a traditional congregation spot like a town center, public street or public sidewalk.

Also, true commercial speech holds a "subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of non-commercial expression.'" *Board of Trustees, S.U.N.Y. v. Fox*, 492 U.S. 469, 477 (1989), quoting *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978).

CONCLUSION

This proposed ordinance, limited to true commercial speech, and limited to certain types of property where the owners have a heightened duty to their guests, regulates the manner in which commercial speech is distributed so that the state Penal Code can

be enforced narrowly, with advance written notice to particular commercial distributors that the private property owners do not consent to the distribution of advertising flyers on their property.

Respectfully submitted,
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Attachment

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